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IN THE SUPREME COURT OF THE STATE OF FLORIDA

TOWN OF MONTICELLO, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF FLORIDA,

Appellant,

vs.

MARY P. FINLAYSON AND D. A. FINLAYSON, HER HUSBAND,

Appellees.

The petitioners make the following statement as to the jurisdiction of the Supreme Court of the United States to review a decree of the Supreme Court of Florida in this case:

By the Judicial Code, Section 237 (a), the Supreme Court of the United States is given jurisdiction to review a final decree of the highest court of a state where is drawn in question the validity of a statute of such state on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of the validity.

The Supreme Court of the United States construes the words "statute of a state" as used in the above connection, as broad enough to cover a municipal ordinance (*King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 72 L. Ed. 801, 48 Sup. Ct. 489; *New Orleans Pub. Service* v. *New Orleans*, 281 U. S. 682, 74 L. ed. 1115, 50 S. Ct. 449) and, we contend, a municipal resolution, which is in force and effect an ordinance, is likewise covered.

The resolutions of the governing authority of Town of Monticello, Appellant, whose validity is called in question, are resolution of October 29, 1925, which is found on pages

7, 8, 9, and 10 of the book containing the minutes of the Town Council of appellant of that date; resolution of April 6, 1926, which is found on pages 68, 69 and 70 of the same book containing the minutes of the Town Council of appellant and the resolution of September 7, 1926, which is found on pages 95, 96 and 97 of the same book containing the minutes of the Town Council of appellant.

The parts of the resolution of April 29, 1925 above mentioned, material to the consideration of the application for and the appeal here sought, is as follows:

"Be It Further Resolved, That a total expenditure of One Hundred Eighty Two Thousand ($182,000.00) Dollars be and is hereby authorized to cover the cost of construction, grading, paving and otherwise improving the streets and avenues described, which said sum represents the total estimated cost of said improvements fixed by the Engineer, H. S. Jaudon Engineering Company, in the plans, specifications and estimates now on file in the office of the Town Clerk as above set forth, and that two-thirds of the expense of said improvements shall be paid by special assessments against all lots and lands adjoining and contiguous or bounding and abutting upon such improvements; that is to say, that one-third of the total cost of said improvements shall be levied against the lots and lands adjoining and contiguous or bounding and abutting upon one side of the improved parts of said streets, avenues and highways above named, and one-third of such cost shall be levied against the lots and lands adjoining and contiguous or bounding and abutting upon the other side of the improved parts of said streets, avenues and highways in accordance with the number of front feet of each of said lots, pieces or parcels of said land, and the remaining one-third of the cost and expense of such improvements of aforesaid shall be paid from

the proceeds derived from the sale of paving Bonds of said Town of Monticello, Florida; and

Be It Further Resolved, That it is the determination of the Town Council, with the advice and consent of the Mayor of said town, that all lots and lands adjoining and contiguous or bounding and abutting upon the several streets, avenues and highways above described will be specially benefited by the improvements provided for in this resolution, and that the special assessments to be made against all lots and lands adjoining and contiguous or bounding and abutting upon said contemplated improvements, shall be upon a foot frontage basis, and that in the preparation of the special assessment roll covering the contemplated improvements, such special benefits shall be determined and pro-rated according to the frontage of the respective lots, properties, and lands specially benefited by said improvements, and

Be it further resolved, That the Town Clerk and Tax Assessor of the Town of Monticello, Florida, be and he is hereby instructed to proceed without delay to make an assessment roll in accordance with the method of assessment provided for in this resolution, assessing the special benefits to be received as the result of the improvements contemplated against all lots and lands adjoining and contiguous or bounding and abutting upon said improvements, which assessment roll shall be completed and filed with the said town council and Mayor as promptly as possible. Said assessment roll shall conform to the requirements of Chapter 9298, Acts of 1923 of the Florida Legislature. Upon completion of said assessment roll, the said Clerk and Assessor shall cause a copy thereof to be published in two successive issues of the Monticello News, a newspaper printed and published weekly in the Town of Monticello, Florida, and shall attach to said assessment

roll a notice (which notice shall be published along with the copy of said assessment roll) directed to all supposed property owners interested in said special assessments, stating a definite time and place where complaints will be heard, and when said special assessments will be finally confirmed by the Town Council and Mayor sitting as an equalizing board;"

The parts of the resolutions of April 6, 1926 and September 7, 1926 above mentioned material to the consideration of this application for and the appeal here sought are practically in the same language as that set out immediately above as to the resolution of October 29, 1925.

The decree of the Supreme Court of Florida, from which this appeal is sought, was entered on March 10, 1944 and rehearing thereon denied on March 31, 1944 and the petition for an appeal is presented to the Chief Justice of the Supreme Court of the State of Florida on May 4th, A. D. 1944.

This case is one in which Appellant seeks to foreclose certain assessment made against appellees' property abutting on certain streets in the course of paving such streets. In the Bill in chancery filed for the purpose of foreclosing said assessment liens, the plaintiff (appellant here) alleges as its authority for making the assessment Chapter 9298 of the Acts of 1923, Florida Laws. Defendants (appellees here) in their Answer denied that any authority had been acquired by the municipality under the statute because the governing authority thereof had not complied with the jurisdictional prerequisites, or conditions precedent, prescribed and required by the statute before any authority would vest in the municipality to proceed under the statute and levy an assessment thereunder, (*City of Ft. Myers* v. *State of Florida,* 95 Fla. 704, 117 So. 907; *A. C. L. R. R. Co.* v. *City of Lakeland,* 94 Fla. 347, 115

So. 699, and *Lots 1685 et al.* v. *Town of DeFuniak Springs*, 174 So. 29, 127 Fla. 348) or in other words, the assessments were made without authority of law and without due process of law, thus raising the Federal question under the XIV Amendment of the Constitution of the United States that no State shall deprive anyone of property without due process of law.

The chancellor below held that the evidence showed that the allegations of the Answer were true and dismissed the Bill. The Supreme Court of Florida, from whose decree this appeal is sought, without reversing the holding of the Chancellor, held, in effect, that the Chancellor's finding was not material to the controversy raised in the case and regardless of that holding and of the fact that the Bill and Answer determined what the controversy was and showed the materiality of the Chancellor's holding, held the resolutions herein before mentioned valid; and thereby committed error in violation of the XIV Amendment of the Constitution of the United States in its provision that no State shall deprive any person of property without due process of law.

WELDON G. STARRY,
Attorney for Petitioner.

APPENDIX.

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, 1944

En Banc.

TOWN OF MONTICELLO, *Appellant*,

vs.

MARY P. FINLAYSON, et vir., *Appellees*.

Jefferson County.

Opinion Filed March 10, 1944.

An Appeal from the Circuit Court for Jefferson County, E. C. Love, Judge; Ausley, Collins & Ausley, for Appellant; D. A. Finlayson and Davis, Davis & McClure, for Appellees.

THOMAS, *J.:*

The statute to which reference will often be made in our discussion of the salient points of the appeal is Chapter 9298, Laws of Florida, Acts of 1923, now appearing in Florida Statutes, 1941, and in F. S. A. as Sections 170.01 et seq. We say that repeated reference will be made to the law because it was to foreclose liens created under it that suit was brought by the town, appellant, against the appellee property owner and her husband. Prior to the creation of these liens, according to the bill of complaint, resolutions complying with Section 3 of the act had been adopted by the town council. They provided for the improvement of certain streets and sidewalks on which were located two lots then owned by the predecessors in title of appellee. Each of them too, provided that two thirds of the cost of construction should be assessed against the owners of lots on the street, according to front footage, and that the remaining one third should be borne by the municipality.

In the pleading there were described in some detail the various steps taken by the municipality or its officers from

the adoption of the original resolution forming the basis for the liens and the issuance of bonds until the liens were perfected. It does not appear necessary to elaborate further on the contents of the bill so far as they referred to the procedure followed by the town council to put in motion and consummate the paving program.

The work contemplated by the town council was completed, so the pleader continued, and the assessments for the property owners' share of the cost were required to be paid in ten annual instalments drawing interest at the rate of eight per cent per annum. Payments were made by the then owner on the instalments for improvements abutting the property of the appellee, some as early as 1926 and some as late as 1929, excepting, however, that none of the assessments for construction of sidewalks was discharged.

Summarizing, the suit was instituted to enforce by foreclosure the payment of these liens, the pleader alleging that in each instance the requirements of the law which we have cited were met in every material particular.

After detailing the procedure culminating in the establishment of liens and after specifying the amounts in default against each lot of the appellee this feature was added in the bill: When the liens attached and the improvements were installed the property involved in this suit was not owned by the appellee. She first became interested in the lots about the year 1927 when she inherited from her father a mortgage on them. In her bill to foreclose this mortgage, filed in the year 1933, she averred that the liens involved in the instant suit had become due and prayed that the mortgagors be required not only to pay the money secured by the mortgage but also such sums as appeared due on the liens. At the trial of that foreclosure suit the amounts of the liens were established, and eventually the property was sold by the master in chancery to Mary P. Finlayson, plaintiff there, appellee here. The sum realized from the sale was not sufficient to discharge the debt, so she applied for a deficiency decree which was subsequently entered specifically providing that she recover, to quote the present bill, "from the said defendants the sum of $4,925.87, which was the amount determined to be due the said Mary P.

Finlayson 'for past due taxes and improvement liens.'" From an exhibit attached to the bill it appears that this appellee for a consideration of $2,000 satisfied the deficiency decree. This, averred the pleader, established in the suit of the appellee the validity of the very improvement liens which she, in the instant case, attacked.

In the answer the authority of the town to invoke the provisions of Chapter 9298, supra, was challenged because of the alleged failure of the officers to follow the requirements there defined in determining the burden which should be placed against the properties abutting the streets improved. Great emphasis was placed by the appellees on the failure to fix the amount of special benefits, and this alleged dereliction was presented in various ways. For instance, it was charged that no notice was given of a hearing to determine *special benefits;* that no hearing was held to consider testimony about *special benefits;* that "no *special benefits* were pro-rated among the various pieces of abutting property"; that "the assessment was made in proportion to the costs of such improvements and in entire disregard to any *special benefits;*" that "the governing authority * * * never * * * discerned any * * * *special benefit* accruing * * * to the property"; that "on the contrary, the value of the * * * property was actually lowered."

Although the actions of the officials generally were questioned it is obvious from the answer, the brief, and the argument of appellees that the attack was centered upon some failure on the part of the officials to investigate and determine what special benefit inured to the property of the defendant by the improvements irrespective of the proportionate cost of the entire improvement allotted according to linear feet along the street.

Further answering, defendants admitted that in the suit for foreclosure which resulted in the appellee Mary P. Finlayson acquiring title to the property it was alleged that the paving and sidewalk liens were long past due, but they denied that the bill in that suit contained a prayer for the payment specifically of amounts due on these assessments. They denied also that in the subsequent petition

for a deficiency decree they particularly sought recovery for these items and asserted that they prayed only a money judgment for the remainder of the deficiency after credit had been allowed for the net proceeds of the sale.

Although, as we have stated, the appellees stressed the absence of any special benefit to the property now owned by one of them, nevertheless their answer having contained the bald statement that the town failed utterly to comply with the procedure outlined in Section 9298, supra, it may not be amiss to give the result of our careful examination of the evidence offered by the plaintiff in support of the bill of complaint. Our perusal of the record has convinced us of the propriety of the governing authority in its every action from the inception of the paving program until its accomplishment. The requisite resolutions, plans, specifications, and the like seem to have been adopted in the manner and at the time required by the law, and evidently all provisions for publication of notices and assessment rolls were scrupulously obeyed. The governing authorities, sitting as an equalizing board, after due notice of their meeting, considered and determined complaints and made necessary adjustment in assessments. Therefore, in the main, no defect in the procedure resulting in the liens against the property of appellee has been discovered.

Evidently it is appellees' view that more than this was required of the city officials, a thought probably suggested by some of the phraseology in Section 2 of the act. We quote so much of this section as is necessary to present clearly the point: "Special assessments against property deemed to be benefited by local improvements * * * shall be assessed upon the property specially benefited by the improvement in proportion to the benefits to be derived therefrom, said special benefits to be determined and prorated according to the foot frontage of the respective properties specially benefited by said improvement, or by such other method as the governing body of the municipality may prescribe." It is patent from this record that the property of appellee was benefited by the paving of the street on which it abutted and by the construction of the sidewalk. The town council so found. Each

of the three resolutions authorizing the work contained the following declaration quoted from one of them: "It is the determination of the Town Council, with the advice and consent of the Mayor of said town, that all lots and lands adjoining and contiguous or bounding and abutting upon the several streets * * * will be specially benefited by the improvements provided for in this resolution, and that the special assessments to be made against all lots and lands adjoining and contiguous or bounding and abutting upon said contemplated improvements, shall be made upon a foot frontage basis, and that in the preparation of the special assessment roll * * * such special benefits shall be determined and pro-rated according to the frontage of the respective lots * * * specially benefited by said improvements." So it appears from the official records the governing authority did, as they were authorized by the Legislature of Florida, determine special benefits to the property which would accrue from the proposed improvements and did prorate it according to "foot frontage" in obedience to the command in Section 2 of the law. Manifestly, special benefit which they determined would result coincided with the cost per front foot of installing the improvement, and in the state of this record, there being no impeachment of this action on the part of the officials save the testimony of the appellee, husband of the property owner, we cannot but conclude that the action of the authorities was proper, a view bolstered by the evidence which we will presently digest in discussing another aspect of the case, estoppel.

It is conceivable that cases might arise where topography or other conditions, or the character of the whole plan, might make unjust the allocation to a particular piece of property of the cost of that part of the construction contiguous to it, after deducting the share assumed by the municipality, where the property owner's share of the expenditure would not correspond with the value of the benefit. Here, however, the defense amounts to little more than pitting the conclusion of the witness as to the unenhanced value of the lots against the authoritative decision of the governing body. This witness was the only one

introduced by appellees. He stated flatly that there was no advantage to the property in the construction of a sidewalk and the paving of the street, but the reasons he gave for this position were hardly convincing. Substance of them was that the sand-clay surface existing before the work was done was sufficient for the demands of traffic and that the value of the lots had not been increased by the improvement. This testimony was not, in our opinion, sufficient to overcome the finding of the town council we have quoted. It is interesting to note in this connection that when asked if he considered the property would be just as valuable if the street were not paved he said, "Why sure," and then added, "if the rest of the town were not paved." When it is remembered that the project involved many of the streets in the central and more heavily traveled portion of the city the qualification given by the witness seems to counteract his insistence that no benefit to the property did in fact derive from the improvement.

The testimony of the witness, supporting co-appellee's position, is further weakened by his admission that both of them paid, albeit reluctantly, the assessments levied under the identical improvement plan against other property they owned.

The appellees insist that the liens sought to be foreclosed are void because of the failure of the governing authority to go farther than the records we have described disclose in determining the extent of benefit to individual properties. To substantiate the assertion they lean quite heavily on our opinion in City of Fort Myers v. State of Florida, 95 Fla. 704, 117 So. 97, the record in which they urge, was "perfectly parallel with the record in our case." The chancellor held the view that the evidence introduced by the plaintiff was insufficient to meet the rule announced in the Fort Myers case.

That controversy is readily distinguishable from this one for reasons given in our opinion, Finlayson v. Town of Monticello, 137 Fla. 697, 189 So. 21, written when appellees here presented for our consideration the order denying their motion to dismiss the *original bill, all of the allegations of which material or relevant to the ques-*

tions now posed appear in the amended bill presently being considered.

Having held *that* bill sufficient and being now convinced that every material allegation of *the present one* was proved despite the evidence adduced by the defendants, it occurs to us that the only consistent decree would be one favoring the plaintiff.

Bearing in mind the premise that no defects in the procedure culminating in the liens rendered them void, we think the combined circumstances reflected in the record establish such acquiescence on the part of the appellee property owner that she may be said to have become estopped. At the time the assessments were made the property was owned by R. J. Taylor, the person who gave a mortgage to the father of one of the appellees. This owner testified in behalf of the town. He stated that he was familiar with the plan and raised no objection to it because, as we understand his testimony, he felt it would increase the value of the property, which would therefore be "especially benefited in proportion to the assessment which was proposed to be made." This attitude on his part seems to have been later emphasized by the payment of some of the assessments before he lost the property to the appellee by foreclosure of the mortgage he had given and she had inherited. It is a mere matter of computation that approximately fifteen years had passed from the time the program was inaugurated until the attack against the procedure was made in this suit, and a period almost as long expired between the acquisition of the mortgage by appellee and her challenge to the validity of the liens. The record does not reveal that she ever, meanwhile, made any protest. At the time her predecessor owned the property the completed assessment roll was published, with notice that at a stated time complaints from dissatisfied property owners would be heard, and the roll finally approved. It has been held by this court that the purpose of such a notice is to give opportunity to a property owner to show "that his property will not derive any special benefit from the improvement" or that it will be "made to bear an unjust proportion of the taxation." Summerland v. City of Punta Gorda, 101 Fla. 543, 134 So. 611. As we have said, not only did the then owner take no ad-

vantage of this opportunity to contest the procedure, but he actually acquiesced in it because of his opinion that the improvement was justified and would enhance the value of the property.

The improvements have long ago been made, and it was estimated by an officer of the town that ninety per cent of all assessments levied under the general plan had been paid. Among those who had met all instalments (on other property) were both appellees. It is true that the appellee D. A. Finlayson, whose wife owned the property in question, had filed a protest on the general ground "that the said assessments and each of them are illegal • • • in law and in fact," but little weight can be given it in considering the proper decree in this case because, in the first place, it was not filed in behalf of his wife; in the second place, she did not at the time own the property in question; and in the third place, by his own testimony he eventually paid the assessments on property he owned.

This brings us to the remaining circumstance of such importance that it may be considered worthy of mention, namely, the construction to be placed upon the bill filed by the appellee in 1933 to foreclose her mortgage and the supplemental proceedings, all of which we mentioned in our analysis of the bill and answer. Her bill of complaint contained the positive allegation "that the said defendants • • • neglected and failed to pay the town taxes on said property since the year 1926; that there are paving and side-walk liens now existing against the said property in favor of the town of Monticello, Florida, for assessments against the property long past due," and it included a prayer that "an accounting be had and stated • • • of the amount of unpaid taxes and assessments for paving and sidewalks against said property." There was incorporated the usual prayer that in default of payment the premises be sold to satisfy the indebtedness. Final decree was eventually entered and the property sold under it to the appellee Mary P. Finlayson for less than the amount of the decree. When the chancellor confirmed the master's report he adjudged "that the complainant do have and recover of and from the defendants • • • the sum of $4925.87, which is the amount due the complainant for past due taxes and

improvement liens, and that execution issue therefor." About five years later the appellees executed an instrument satisfying that judgment upon payment of $2,000.

In view of the allegations and the prayer in the bill of complaint in the other suit and the recital in the deficiency decree it seems only fair to decide that the appellee's position in this suit may be added to the other circumstances indicating that positively, as well as passively, she had become estopped from assailing the actions of the governing authority.

Thus we conclude that the appellant proved the material allegations of the bill, which we had on a former occasion held sufficient, and established by the testimony the observance by the governing authority of the essential requirements of the law in inaugurating and effectuating the paving project. The record reveals, also, circumstances and conditions establishing estoppel on the part of the appellee property owner. The final decree dismissing the bill of complaint is, therefore, reversed with directions to enter one for the appellant for the amounts which may be easily calculated from the evidence and the master's report.

Reversed.

BUFORD, C. J., ADAMS and SEBRING, J. J. concur.
BROWN, J., concurs in conclusion.
CHAPMAN, J., dissents.
TERRELL, J., not participating.

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No. 194

IN THE

UNITED STATES SUPREME COURT

MARY P. FINLAYSON and D. A. FINLAYSON, her husband,

Appellants,

vs.

TOWN OF MONTICELLO, a municipal corporation under the laws of the State of Florida,

Appellee.

BRIEF OF APPELLANTS ON MOTION TO DISMISS OR AFFIRM

W. G. STARRY,
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Combes vs. City of Coral Gables
168 So. 524, 124 Fla. 374

Finlayson vs. Town of Monticello
137 Fla. 697, 189 So. 21

Gulfview Apartments, Inc. et al vs. City of Venice
108 Fla. 41, 145 So. 842

Lots 1685 et al vs. Town of DeFuniak Springs
174 So. 29, 127 Fla. 348

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298 U. S. 468, 56 S. Ct. 906, 911, 80 L. Ed. 1288

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Florida Statutes 1941, Section 170.01 et seq.

OFFICIAL REPORTS OF THE DECISIONS ON THIS CASE

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137 Fla. 697, 189 So. 21

Town of Monticello vs. Finlayson
17 So. 2nd 84, (not yet reported in Fla. reports)

IN THE

UNITED STATES SUPREME COURT

MARY P. FINLAYSON and D. A. FINLAYSON, her husband,

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Appellee.

BRIEF OF APPELLANTS ON MOTION TO DISMISS OR AFFIRM

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The resolutions of the governing authority of the municipality of the Town of Monticello levying the assessments were without the authority of the statute Chapter 9298, Laws of Florida 1923, alleged in the Bill seeking to foreclose the alleged assessment liens as the authority for adopting the resolutions making the assessment, because of the failure of the governing authority of the municipality to obtain authority to use said statute for the purpose of levying the assessment without having first performed certain affirmative action, more specifically set out in the following brief, prescribed as jurisdictional prerequisites to be complied with before the municipality could use the statute to make the assessments. That, therefore, the

assessments were without authority of law and, if enforced, would result in depriving the appellants of their property without due process of law, in violation of the XIV Amendment of the Constitution of the United States. The validity of these resolutions having been upheld by the Supreme Court of Florida, notwithstanding the want of law for adopting them, and thereby constituting them, as adopted, in violation of the XIV Amendment of the Constitution, this holding as to the validity of the resolutions, we contend, is a fit subject of jurisdiction of the Supreme Court of the United States.

HISTORY OF THE CASE

The proceeding was instituted by Bill of Complaint filed by the Town of Monticello, a municipal corporation of the State of Florida, in the Circuit Court of Jefferson County, Florida. The relief sought was the foreclosure of alleged special improvement liens arising from three paving programs affected in 1925 and 1926. Authority for the paving and special assessments against abutting property was alleged in the Bill to be Chapter 9298, Laws of Florida, Acts of 1923, or as brought forward in Florida Statutes 1941, *Section 170.01 et seq.*

The Answer specifically denied that any authority had been acquired under the law as alleged in the Bill because certain jurisdictional prerequisites, prescribed by the statute to be complied with before the municipality could obtain the authority of the statute to make the assessments, had not been complied with, which constituted the main defense going to the whole action.

Issue being joined, the matter was referred to a Special Master to take the evidence and make findings of law and fact. Special Master made no finding on this main issue, but found the liens of such special assessments to be valid, and the obligations secured thereby to be in default and recommended that upon failure to pay the amounts determined to be due, foreclosure be ordered. The defendants, appellants here, filed exceptions to the report based on the failure of the Master to find on the main issue above mentioned and, upon a hearing of the same, the Circuit Court sustained the exceptions to the Master's Report and proceeded to make a finding on that issue, and finding the facts as alleged in the Answer to be true, ordered the Bill dismissed. The plaintiff, (appellee here) appealed from

this Order or decree to the Supreme Court of Florida, where a reversal was entered and decree ordered to be entered in favor of plaintiff.

An appeal to the United States Supreme Court, from this Order, is now sought.

ARGUMENT

(All italics occurring in this Argument are ours, unless otherwise noted.)

I.

The Court will readily see, we believe, how completely the Appellee has mis-stated the Federal question involved, and to be considered, in this Appeal in its Motion to Dismiss or Affirm. The question, we think, is clearly indicated in Appellants' Assignment of Error (original transcript of the record P.....8.6.....) and may be briefly stated.

The resolutions of the governing authority of the municipality levying the assessments were without authority of the statute because of the failure of the governing authority of the municipality to obtain authority to use the statute for the purpose of levying the assessments without having first performed certain affirmative action prescribed as jurisdictional prerequisites to be complied with before the municipality could use the statute to make the assessments. That, therefore, the assessments were made without authority of law and, if enforced, would result in depriving these appellants of their property without due process of law, in violation of the XIV Amendment of the Constitution of the United States.

Those jurisdictional prerequisites require that there must be held a hearing, after due notice of such hearing, at which evidence, competent and of probative value sufficient to establish the fact of the actual special benefit that would accrue to the assessed property from the public improvement sought to be undertaken under the authority of the Act, must be introduced and considered, and from such evidence, after such hearing, there must be a finding of the amount of special benefit that would be prorated

among the various pieces of property to be assessed, and the actual amount of the benefit to be received by each piece of property determined, before such governing authority could act under the authority of the statute and levy an assessment against such property.

This clearly appears from the following citations interpreting Section Two (2) of the statutes by the Supreme Court of the State of Florida in several cases, which holdings form a complete, clear and unequivocal interpretation of the section, and are as follows:

> "Special Assessments for local improvements although resting on the taxing power are distinguishable in many respects from a general tax imposed for state, county, or municipal purposes. The fair and just foundation on which special assessment for local improvements rests, is *special benefits accruing to the property benefitted,* that is to say, benefits received by it, in addition to those received by the community at large." City of Ft. Myers v. Florida, et al, 95 Fla. 704, at page 721-22 of the opinion, 117 So. pages 97-104.

And at page 98 the Court, in the same opinion, says:

> "Under Chapter 12719 Acts of 1927" (or its prototype 9298 Acts 1923) "it is mandatory *that before the resolution authorizing public improvements provided in subsection B"* (or Section 3, 1923 Acts) *"can be legally adopted* the city commission must have determined that benefits will accrue to the property improved, *the amount thereof,* how such benefits will be *prorated* and *that Special Assessments will be made in propor-*

tion to said benefits as directed by Subsection A"
7 Hdnt. Id.

And the Court in an opinion by Mr. Justice Buford (Lots 1685 et al vs. Town of DeFuniak Springs, 174 So. 29, 127 Fla. 348) says:

> "It is contended that the bill of complaint fails to allege the adoption and publication by the town's governing authority of a resolution determining that benefits would accrue to the property, *the amount of the benefits, that the special assessment would be made proportionate to the benefits, and that they would not exceed the benefits.*"
>
> "This contention is well founded for the bill of complaint does not contain any allegation relating to this *prerequisite jurisdictional resolution.*"
>
> • • • •
>
> "It is mandatory that a resolution in conformity with this statutory requirement be adopted, City of Ft. Myers v. State of Florida, 95 Fla. 704, 117 So. 97."

And in speaking of the resolution, in the Ft. Myers case Supra, the Court says:

> *"The resolution on its face does not show any specific finding of benefits to the property improved or that such benefits were equal to* or (not) *less than the special assessments. We think such a finding was mandatory."*

And in the Ft. Myers case supra, the Court says:

> "The resolution of June 3, 1927, resolves to make

'public improvements of paving and to construct concrete curb and gutter, together with the necessary storm sewers, catch basins, manholes and accessories.' It also determined to prorate the benefits to be derived from such improvements by the front-foot rule. Section Fifty of Chapter 12719, Acts of 1927, being the Act under which the commissioners proceeded, commands that in no instance shall the amount assessed against the benefited or abutting property exceed the amount of the benefits estimated to accrue to said property. *The resolution on its face does not show any specific finding of benefits to the property improved or that such benefits were equal to* (or not) less than the special assessments. We think such a finding was mandatory."

And again in the Ft. Myers case supra, the Court says:

"In some jurisdictions, it is the rule that special or peculiar benefits actually accruing *and determined after a notice and hearing is essential to the validity of a special assessment,* while, in other jurisdictions, it is held that the presumption of special benefits grounded upon a legislative determination thereof is sufficient to justify an assessment in proportion to the front footage or according to any other fair and reasonable rule. Dillon on Municipal Corporations, 5th Edition, Volume 4, page 2615. *The statute under consideration is controlled by the former rule."* 17th Hdnt. City of Ft. Myers vs. State of Florida supra.

And in A. C. L. Ry. vs. City of Lakeland (94 Fla. 347, 115 So. 669) the Court says:

"Whether private property which is assessed or to be assessed for any part of the costs of a proposed or fully completed public improvement is *in fact specially benefitted by the paving* of a street on which the property assessed or to be assessed abutts or by any other local public improvement is a question to be ascertained and established as any other fact may be established, that is to say, *by competent evidence of probative value* sufficient to establish the fact; it does not rest in the mere assertion of the municipal authorities." Atlantic Coast Line Railroad Co. vs. City of Lakeland Supra 2nd Hdnt.

And in the Ft. Myers case supra at pages 104-5 So. Rep., the Court says:

"For all the record here discloses the rule as announced in the preceding paragraph was completely ignored. The assessments seem to have been predicated on the cost of the improvement rather than on the amount of benefits prorated and if any benefits were determined they were predicated on assessments rather than actual increase in value to the lands improved. *We think it imperative under the applicable statute that there must have been a specific finding of benefits that the assessments made were not in excess of the benefits found and that any assessment imposed without regard to the benefits found is arbitrary and invalid.* Walsh v. Barron, 61 Ohil St. 15, 55 N. E. Rep. 164; Doughton v. Camden, 72 N. J. L. 451, 63 Atl. Rep. 150; Simmons v. City of Passaic, 42 N. J. L. 524; Cronin v. Jersey City,

38 N. J. L. 410; Signer v. Fuller, 34 N. J. L. 227; Essen v. Common Council of City of Cape May, 77 N. J. L. 361; 72 Atl. Rep. 49; Hutchinson v. Storrie, 92 Tex. 685; 41 S. W. Rep. 848; Kettle v. Dallas, 35 Tex. Civ. Appl. 632, 80 S. W. Rep. 874."—

A description singularly applicable to the Monticello proceedings.

As to the significance of the word "hearing" used in similar circumstances, this Court has this to say in an opinion by Mr. Chief Justice Hughes, in the case of Morgan vs. United States, 298 U. S. 468, 56 S. Ct. 906, 911, 80 L. Ed. 1288:

> "The 'hearing' is designed to afford the safeguard that the one who decides shall be bound in good conscience to consider the evidence, to be guided by that alone, and to reach his conclusion uninfluenced by extraneous considerations which in other fields might have play in determining purely executive action. The 'hearing' is the hearing of evidence and argument."

At another point in his decision in the above cited case, Mr. Chief Justice Hughes observes:

> "That duty is widely different from ordinary executive action. It is duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of facts. Nothing can be treated as evidence which is not introduced as such."

The Supreme Court of Florida has never receded from the holdings above set out, but, on the other hand, inferentially endorses them in its opinion in the instant case, by way of confession and avoidance, when in the opinion, after saying:

> "The Chancellor held the view that the evidence introduced by plaintiff was insufficient to meet the rule announced in the Fort Myers case,"

it says;

> "That *controversy* is readily distinguishable from this one for reasons given in our opinion, Finlayson vs. Town of Monticello, 137 Fla. 697, 189 So. 21";

The controversy is identical; the controversy in each case was whether the jurisdictional prerequisite prescribed by the statute had been complied with before proceeding to levy the assessment, as the record indisputably shows.

II.

CASES CITED BY APPELLEES IN MOTION TO DISMISS OR AFFIRM

The cases cited by Appellee in its Motion to dismiss or affirm have no bearing on the Federal question involved in this appeal.

They either relate (1) to cases where the assessment itself is made under authority of law and there is no question of that authority, but in its operation the assessment affects rights peculiar to a property owner, who does not object within the proper time—the assessment not being void as a whole but only voidable; (2) where special statute itself provides for a *post facto* hearing on the validity of the assessments; or (3) where there is a legislative determination, contained in the statute itself, of benefits.

1. The validity of the assessment *as a whole* is questioned in this appeal and not the peculiar rights of any particular property holder, except as affected ultimately by the enforcement of the void assessment.

2. The statute does not place upon the affected property owner, where above mentioned jurisdictional prerequisites have not been complied with but nevertheless the assessment has been levied, the burden of invalidating the assessment. A hearing before an equalizing board, provided for by a void resolution, held for the purpose of equalizing among the pieces of assessed property a void assessment, could not be so construed. The meeting of such a board is just as unauthorized by law as the resolution making the assessment and ordering a hearing.

The provisions of this Section Two (2) of Chapter 9298, as construed by the Supreme Court of Florida, as here-

inbefore set out, is constituted a barrier, by the statute, from public policy, to protect all municipal property in the state from arbitrary assessments and from any burden being put on the property owner to protect himself against the unwarranted use of the taxing power of the state, except when there should be some attempt to enforce the void assessment, and to safeguard the constitutional rights under both State and Federal constitutions, by providing (1) that the assessment must be in proportion to, that is, not in excess of, actual special benefit accruing to the property from the improvement; and (2) that the *amount of* that special benefit must be *pre-determined before* the municipality can avail itself of the provisions of section 3 of the act; a barrier which cannot be ruthlessly brushed aside or ignored in the municipality's haste to avail itself of section 3. All action taken in disregard of this section 2, as interpreted by the Supreme Court of Florida, is void, being without authority of law—*no power is conferred by the act on the municipality to avail itself of the other provisions of the act.*

3. Nor does the statute itself contain any legislative determination of the benefits to take the place of these prerequisite jurisdictional findings by the governing authority of the municipality, as clearly appears from the ruling of the Florida Supreme Court in the Fort Myers case Supra, when it says:

> "In some jurisdictions, it is the rule that special or peculiar benefits actually accruing *and determined after a notice and hearing is essential to the validity of a special assessment,* while, in other jurisdictions, it is held that the presumption of special benefits grounded upon a legislative de-

termination thereof is sufficient to justify an assessment in proportion to the front footage or according to any other fair and reasonable rule. Dillon on Municipal Corporations, 5th Edition, Volume 4, page 2615. *The statute under consideration is controlled by the former rule.*" 17th Hdnt. City of Ft. Myers vs. State of Florida supra.

III.

ESTOPPEL

The holding of the Supreme Court of Florida in the instant case that appellants are estopped from urging the matters urged in defense of the suit can have no bearing on this appeal.

The defense here is based on the allegation of fact that the assessments sought to be enforced in the suit were made without authority and are wholly void; and estoppel cannot preclude the raising of the question of whether or not the assessments are wholly void.

It is almost universally held that, if the assessment is wholly void, estoppel does not obtain. The Supreme Court of Florida, itself, holds that way:

Gulfview Apartments, Inc. et al vs. City of Venice, 108 Fla. 41, 145 So. 842, where it is said,

> "When paving assessment is void, failure to object within time limited does not raise estoppel."

And in another place in the opinion:

> "We are conscious of the rule to the effect that the doctrine of estoppel has no application when an assessment is wholly void; that is to say, when the assessment is made in such a manner as to render it invalid, or when constitutional or statutory provisions essential to its validity are completely ignored." Gulfview Apartment vs. City of Venice, 108 Fla. 41, 145 So. 842.

Also in Combes vs. City of Coral Gables, 168 So. 524, 124 Fla. 374:

"Rule that taxpayer may waive his right or may be estopped to contest validity of tax lien is not applicable where lien is utterly void."

In the instant case the holding that appellants are estopped is expressly hypothecated on the alleged fact that the assessment is not void, as witness the following quotation from the opinion in the instant case:

> "*Bearing in mind the premise that no defects in the procedure culminating in the lien rendered them void,* we think the combined circumstances reflected in the record establish such acquiescence on the part of the appellee property owner that she may be said to have become estopped." (P. 57 of the original transcript of the record.)

IV.

CONCLUSION

Neither the Motion of Appellee to Dismiss or Affirm nor the opinion of the Court in the instant case anywhere contend that the jurisdictional prerequisities required before Section 3 and subsequent sections of the statute can be used, were complied with; but they both concern themselves entirely with the regularity of the resolution as to the *modus operandi* of levying the assessment itself as provided by Section 3 and subsequent sections of the statute in question, which is of no concern in this appeal in view of the fact that the use of these sections were entirely without authority of law.

Having fully shown that the grounds upon which appellees base their motion to dismiss or affirm are not adequate we would respectfully ask that the motion be denied.

Respectfully submitted,

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Attorney for Appellant.

JUN 26 1944
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 194

MARY P. FINLAYSON AND D. A. FINLAYSON, HER HUSBAND,

Appellants,

vs.

TOWN OF MONTICELLO, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

CHAS. S. AUSLEY,
LEROY COLLINS,
LAWRENCE A. TRUETT,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 194

MARY P. FINLAYSON AND D. A. FINLAYSON, HER HUSBAND,

Appellants,

vs.

TOWN OF MONTICELLO, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

APPELLEE'S STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

Appellee, believing that the matters set forth below will demonstrate the lack of substance in the question raised by this appeal, files this its statement in opposition to appellants' statement as to jurisdiction. Appellee includes herein its motion to dismiss the appeal or in the alternative to affirm the judgment of the Supreme Court of the State of Florida on the grounds that (1) the appeal is frivolous; (b) there is not presented a substantial federal question; (c) it affirmatively appears that the determination by the

Supreme Court of Florida that the appellants were estopped from asserting the alleged defense to the foreclosure of the improvement liens sued upon, is a sufficient nonfederal ground supporting the decision complained of, and precluding the appeal to the United States Supreme Court on the alleged federal grounds.

The matters here relied upon by the appellee are more particularly stated below:

1.

The Appeal Is Frivolous.

The proceeding was initiated by bill of complaint filed by the Town of Monticello, a municipal corporation of Florida in the Circuit Court of Jefferson County, Florida. The relief sought was the foreclosure of alleged special assessment improvement liens arising from three paving programs effected in 1925 and 1926. Authorization for the paving and special assessments against the abutting property owners was bottomed on Chapter 9298, Laws of Florida, Acts of 1923, Sections 170.01 et seq. Florida Statutes, 1941. When issue was joined, the matter was referred to a Special Master with directions to take the evidence and make findings of law and fact. The Special Master found the liens to be valid and subsisting, the obligations secured thereby to be in default, and recommended that upon failure to pay the amount determined to be due, foreclosure be ordered. The defendants filed exceptions to the report and upon a hearing on the same, the Circuit Court dismissed the bill. The plaintiff appealed from this order to the Supreme Court of Florida where a reversal was entered and foreclosure ordered. An appeal to the United States Supreme Court from this order is now sought.

The crux of the appellants' contention to support the appeal is that the record does not disclose any public hear-

ing, *prior to the adoption of the resolution*, by which the improvement in each instance was initiated, for the determination of special benefits. Hence the land owner was denied his privileges secured by the 14th Amendment to the Constitution of the United States. The constitutionality of Chapter 9298, supra, is not assailed. This statute does not require such a hearing. It enumerates the procedure required to effect the liens and does provide a hearing and notice thereof prior to the establishment of the liens. That this hearing was held after due notice, was fully established and was not questioned before the Supreme Court of the State and is not questioned on this appeal. In its decision the Florida Supreme Court expressly determined:

> "Our perusal of the record has convinced us of the propriety of the governing authority in its every action from the inception of the paving program until its accomplishment. The requisite resolutions, plans, specifications, and the like, seem to have been adopted in the manner and at the time required by law, and evidently all provisions for publication of notices and assessment rolls were scrupulously obeyed. The governing authorities, sitting as an equalizing board after due notice of their meeting, considered and determined complaints and made necessary adjustment in assessments. Therefore in the main no defect in the procedure resulting in the liens against the property of appellee has been discovered."

The appellants have not included in the record here the evidence supporting the fact that each step in the statutory proceeding to effect the liens was carefully followed. They do not even challenge the finding by the State Court of this fact, and thereby admit its truth. They seek to assail the validity of the initiating resolution standing alone. They argue that this resolution is in effect a municipal ordinance and therefore a "statute" within the meaning of sub-section (b) of Section 344, Title 28, of the Judicial Code. This

resolution can be given no such effect. It is a component part of a proceeding, comprising many other factors. The validity of the liens, if reviewed, must be considered in the light of the entire proceeding by which they were sought to be established. Hence the appeal sought is without support and is frivolous.

II.

There Is Not Presented a Substantial Federal Question.

The only alleged federal question is a failure by the municipality to have a hearing to determine benefits, and give notice thereof, *prior to the adoption of the initiating resolution.* We reiterate that no such hearing is required by the statute involved and the validity of the statute is not challenged. The statute does require a hearing and notice thereof before final approval of the assessments (Section 7 *et seq* of Chapter 9298, *supra;* Section 170.07 *et seq.*, Florida Statutes, 1941). That this hearing was had as provided is not questioned.

That no substantial federal question is presented is supported by the decision of this Court in a Florida case exactly in point. See:

Utley, et al., v. *City of St. Petersburg, Fla.*, 292 U. S. 106; 54 S. Ct. 593; 78 L. Ed. 1155.

In point also are the following decisions of this Court:

Bass et al., v. *The Mayor and Alderman of the City of Milledgeville*, 295 U. S. 721; 55 S. Ct. 926; 75 L. Ed. 1675.

Cass Farm Company, Ltd., et al., v. *City of Detroit, et al.*, 181 U. S. 399; 21 S. Ct. 624; 45 L. Ed. 395.

French v. *Barber Asphalt Pav. Co.*, 21 S. Ct. 625, 181 U. S. 324, 45 L. Ed. 879.

Farrell v. *West Chicago Park Comm'rs* Ill., 21 S. Ct. 609, 181 U. S. 404, 45 L. Ed. 916.

Hibben v. *Smith*, 24 S. Ct. 88; 191 U. S. 310; 48 L. Ed. 195.

As pointed out in the case of

Campbell v. *City of Olney*, 262 U. S. 352; 43 S. Ct. 559; 67 L. Ed. 1021.

"Plaintiff in error had opportunity to be heard before the City Council and was allowed a reasonable time after the assessment to bring suit to set it aside or to correct it or any proceeding with reference thereto. He failed to avail himself of the rights so given him by State laws. Their validity was not drawn into question. His claim that he was denied due process is not even colorable. (Many cases cited). There is no federal question in the case."

The Supreme Court of Florida has expressly upheld the constitutionality of the act against asserted violation of the due process clause of the State Constitution and the United States Constitution. See:

Summerland v. *City of Punta Gorda*, 134 So. 611, 101 Fla. 543.

Walters et al., v. *City of Tampa, et al.*, 101 So. 227; 88 Fla. 178.

III.

It affirmatively appears that the determination by the Supreme Court of Florida that the appellants were estopped from asserting the alleged defense to the foreclosure of the improvement liens sued upon, is a sufficient nonfederal ground supporting the decision complained of, and precluding the appeal to the United States Supreme Court on the alleged Federal grounds.

The Florida Supreme Court held the appellants to be estopped from asserting the invalidity of the liens. The estoppel was bottomed upon these facts established by the record and not challenged here:

(a) No complaint by owner appellant was made at the hearing;

(b) No steps were taken by owner to vitiate assessments for long period of years;

(c) Appellants recognized and assented to validity of liens in mortgage foreclosure procedure by which title to property was acquired;

(d) Appellants asserted validity of liens in mortgage foreclosure proceeding and made a recovery of financial benefit based upon such validity;

(e) Appellants assented to validity of liens by paying like assesments on other property.

This finding of estoppel, which is not assigned as error here, is sufficient to support the decision of the State Court. It was expressly so held in the case of *Utley et al.*, v. *City of St. Peterburg, Fla., supra.* Or like effect is the decision of this Court in the case of

Theresa McSweeney v. *Equitable Trust Company,* 315 U. S. 785; 62 S. Ct. 805, 86 L. Ed. 1191 (facts shown by report of case from State Court 127 N. J. L. 209; 22 Atl. 2nd 282).

Wherefore, the appellee submits this statement showing the appeal to be frivolous; that the question is not a substantial federal one; and, that the finding of estoppel is sufficient to support the decision of the State Court; and respectfully moves the Court to dismiss the appeal or in the alternative to affirm the decision of the Supreme Court of the State of Florida entered herein.

(s) CHAS. S. AUSLEY.
(s) LEROY COLLINS.
(s) LAWRENCE A. TRUETT.

AUSLEY, COLLINS & TRUETT,
Attorneys for Appellee.

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 194

MARY P. FINLAYSON AND D. A. FINLAYSON, HER HUSBAND,

Appellants,

vs.

TOWN OF MONTICELLO, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

APPELLANTS PETITION FOR REHEARING OF MOTION TO DISMISS AND ORDER DISMISSING

WELDON G. STARBY,
Counsel for Appellants.

IN THE

UNITED STATES SUPREME COURT

MARY P. FINLAYSON and D. A. FINLAYSON, Her Husband,

Appellants,

VS.

TOWN OF MONTICELLO, A Municipal Corporation under the Laws of the State of Florida.

Your petitioners, Mary P. Finlayson and D. A. Finlayson, her husband, appellants in the above entitled cause, in this their petition for a rehearing on the motion to dismiss their appeal and the Order of the Court dismissing said appeal, would respectfully show that they believe and would aver that the Court has been led to enter its Order dismissing the appeal in this case by a failure to discern the actual Federal question that the petitioners urge as a basis for this appeal.

That the Federal question urged is involved and grows out of the statement of fact set out in the assignment of error, and borne out by the record, to the effect that the municipality *acquired no authority* to levy the assessments sought to be enforced because it failed to adopt, not only in the manner but at all, the *jurisdictional prerequisite* resolution required by the statute as interpreted by the Supreme Court of Florida in several cases (see Appendix A, attached for the convenience of the Court, infra, page 10) "before it could legally adopt" the resolution levying the assessment.

That the Federal question involved naturally follows: Inasmuch as the resolutions levying the assessments were adopted without the authority of the statute alleged in the Bill as authority, the assessments were made without authority of law and, if enforced, would result in depriving the appellants of their property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States in its provision that no State shall deprive any person of property without due process of law.

That this failure to obtain the authority of the statute to levy the assessments was constituted the main defense to the action, which issue was made on the very threshhold of the case by the allegations of the Bill, in its second paragraph, that the assessments were levied under authority of Chapter 9298, Laws of 1923, and the answer, in its second paragraph, denying that any authority had been obtained and detailing the subsidiary facts culminating in the ultimate fact that no authority had been obtained. (See Appendix B, infra, page 12.)

That the chancellor in the trial court below, upon the inspection of the records of the municipality pertaining to the levy of the assessments, could not find the jurisdictional prerequisite resolution required by Section 2 of the statute as interpreted by the Supreme Court of Florida in the only interpretation ever announced of the section by the Court, and, in effect, decided that the assessments were levied without authority of law and dismissed the bill solely on that ground.

That upon the case reaching the Supreme Court of

Florida on the appeal by the municipality, that Court made but one brief reference to the Chancellor's decree and the grounds on which he rested it contained in the following:

> "The Chancellor held the view that the evidence introduced by the plaintiff was insufficient to meet the rule announced in the Fort Myers case. That controversy is readily distinguishable from this one for reasons given in our opinion, Finlayson vs. Town of of Monticello, 137 Fla. 697, 189 So. 21."

That the failure of the Court to reverse the Chancellor in either his finding of law, that the rule announced in the Fort Myers case was still in effect, or his finding of fact that the evidence introduced by plaintiff was insufficient to meet the rule, and the sidestepping in saying "that the controversy was readily distinguishable from this one for reasons given in our opinion, Finlayson vs. Town of Monticello, 137, Fla. 697, 189 So. 21" was to leave the one and only ground on which the Chancellor rested his decree dismissing the bill unquestioned; and excluded it from any part in the discussion of the opinion.

That what the controversy was is a question to be answered by the record, inspection of which lies in the province of this Court; that the bill and answer (see Appendix B, infra, page 12) determine what the controversy was.

That the opinion in Finlayson vs. Town of Monticello, supra, was entirely valueless as precedent: It was rendered on merely a question of pleading as to the necessary averments of the bill, and not on what might be pleaded by way of defense; and was not the opinion of the Court, but of three Justices of an equally divided Court, three

Justices only concurring in the opinion, while the Chief Justice dissented and the other two Justices of the Six Justice Court specially concurred in only the result of not reversing the Chancellor (see Appendix C, infra, page 14) which decided nothing except that the Chancellor below would not be reversed (see Appendix C, infra, page 15 for the conclusion of the opinion).

That even did the opinion from which the appeal is taken reverse the doctrine announced in the citations set out in Appendix A, infra, page 10, it comes too late to have that effect in the instant case inasmuch as appellants' property rights under the protection of the Constitution of the United States are affected and the previous rulings of the State Supreme Court were the law of Florida at the time of the levying of the assessments, the bringing of the suit, and the Chancellor's decree dismissing the bill; it cannot affect this suit; it is the status of the law at the time of the levying of the assessments, as interpreted by the Supreme Court of Florida, that governs in this case to determine whether the appellants are entitled to the protection of the Constitution of the United States in their property rights.

That the finding of the opinion here appealed from, "Our perusal of the record has convinced us of the propriety of the governing authority in its every action from the inception of the paving program until its accomplishment. The requisite resolutions, plans, specifications, and the like seem to have been adopted in the manner and at the time required by the law, and evidently all provisions for publication of notices and assessment rolls were scrupulously obeyed.

The governing authorities, sitting as an equalizing board, after due notice of their meeting, considered and determined complaints and made necessary adjustment in assessments. Therefore, in the main, no defect in the procedure resulting in the liens against the property of appellee has been discovered.",

and have no reference to the failure of the municipality to obtain the authority of the statute to levy the assessments, as the "inception of the paving program" is fixed as the adoption of the resolution required by *Section 3* of the statute as follows:

"The statute to which reference will often be made in our discussion of the salient points of the appeal is Chapter 9298, Laws of Florida, Acts of 1923, now appearing in Florida Statutes, 1941, and in F. S. A. as Sections 170.01 et seq. We say that repeated reference will be made to the law because it was to foreclose liens created under it that suit was brought by the town, appellant, against the appellee property owner and her husband. Prior to the creation of these liens, according to the bill of complaint, resolutions complying with Section 3 of the act had been adopted by the town council. They provided for the improvement of certain streets and sidewalks on which were located two lots then owned by the predecessors in title of appellee. Each of them too, provided that two-thirds of the cost of construction should be assessed against the owners of lots on the street, according to front footage, and that the remaining one-third should be borne by the municipality."

That it will be observed also that the jurisdictional pre-

requisite resolution is entirely wanting; that it was not required by *Section 3*, but by Section 2.

That this Court should not be mislead by the repeated attempt in the opinion to dissociate the *subsidiary facts leading up to the ultimate fact of no authority* set out in the answer (Appendix B, infra, page 12) and make them independent steps to be taken in the course of adopting the resolution under Section 3.

That all the aftermaths of levying the assessments such as payment by persons of the assessment against their property, etc., detailed in the opinion cannot supply authority to levy the assessment.

> "Municipal corporations have no inherent power to levy special assessments; and in order that such assessments be valid and enforceable, they must be made under pursuance of legislative authority and the method prescribed by the legislature, substantially followed. City of Coral Gables vs. Coral Gables, Inc., 159 Fla. 30, 160 So. 476; Car v. City of Kissimmee, So. Fla. 756, 86 So. 699."—Simpson et al v. City of Brooksville, et al, 188 So. 795."

That the long lapse of time between levying the assessments and the present litigation growing out of it is not chargeable to the appellants, who are defendants, not plaintiffs seeking affirmative relief, and entered their defense promptly upon the commencement of proceedings by the town.

That whatever laches were incurred are chargeable to the municipality, which, *in disregard of the direction of*

Section 10 of the statute (Florida Statutes, 1941), delayed filing its bill several years after the first default in the payment of installments by the property owner.

That estoppal does not obtain since the defense is based on the claim that the assessments are void (See Appendix D, infra, page 16).

That the cases Campbell v. Olney, 262 U. S. 352; North Laramie Land Co. v. Hoffman, 268 U. S. 276, 283; Utley v. St. Petersburg, 292 U. S. 106; Anderson National Bank v. Luckett, 321 U. S. 233, 247, cited by the Court in support of its Order dismissing the appeal, do not involve the Federal question urged in this appeal; the two relating to improvements assessments, the Olney and the St. Petersburg, are each founded upon a statute diametrically and fundamentally different from the statute involved in this appeal in their provisions; the two each presuming validity, places the burden of impeaching the assessment on the property owner, while the statute herein under consideration not only places the burden of the jurisdictional prerequisite finding of the amount of the actual benefit that would accrue to the assessed property, and making sure that the assessment would not exceed the benefits found to accrue, on its own initiative, before it can obtain the authority of the statute to levy the assessments on the municipality, as hereinbefore set out, but the burden of testing the validity of the assessment by promptly commencing proceedings to enforce the assessments upon the first default in the payment of installments, Florida Statutes, 1941, Section 170.10.

That the rule announced in the other two cases, that this

Court accept the interpretation placed on the State Statute by the highest Court of the state is in appellants' favor, calling, as it does, for the acceptance by this Court of the specific holdings of the Supreme Court of Florida in its interpretation of Section 2 of the statute under consideration set out in Appendix A, Supra, page 10; there is no other specific interpretation set out in the opinion, but an assumption of an arbitrary discretion not to apply the interpretation in the incident case on the alleged fact not borne out by the record, that the controversy does not call for it, a fact to be reviewed by this Court under its well settled rule "the Supreme Court of the United States may review a decision of a State Court upon the finding of fact if a Federal right has been denied as a result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question to analyze the facts, Aetna Life Insurance Company, et al., vs. Pearl Stone, Administratrix Estate W. J. Duncan, Deceased, 266 U. S. 389, 69 L. Ed. 343, 45 S. Ct. 129.

That this appeal is taken not on account of any denial to the appellants of an opportunity to be heard in defense of their property rights as against the assessments sought to be enforced, but to obtain the protection of the Constitution of the United States against an assessment levied against their property *without authority of law*, because of the failure of the municipality, *on its own initiative*, to adopt the *jurisdictional* prerequisite resolution finding the *amount* of the special benefits that would actually accrue to the assessed property from the improvements, and that the assessments would not exceed the benefits so *found*.

WHEREFORE, your petitioners pray that the Order entered herein on October 9, 1944, dismissing the appeal, be vacated and set aside; and that the cause be restored to the docket of the Court to be further heard at such time as to this Honorable Court may seem fit.

And your petitioners will ever pray.

Weldon G. Starry

Counsel for Petitioners

STATE OF FLORIDA
COUNTY OF LEON

I, Weldon G. Starry, counsel for appellants in the above entitled cause, do hereby certify that the foregoing petition for a rehearing of the motion to dismiss and the Order dismissing the appeal is presented in good faith and not for delay.

Weldon G. Starry

Subscribed and sworn to before me this 28 day of October, A. D. 1944.

Lila M. Davis

Notary Public, State of Florida at Large. My Commission expires:

Notary Public State Florida at Large
My Commission expires Dec. 8th, 1944

APPENDIX A

"Special Assessments for local improvements although resting on the taxing power are distinguishable in many respects from a general tax imposed for state, county, or municipal purposes. The fair and just foundation on which special assessment for local improvements rests, is special benefits accruing to the property benefitted, that is to say, benefits received by it, in addition to those received by the community at large." City of Ft. Myers v. Florida, et al, 95 Fla. 704, at page 721-22 of the opinion, 117 So. pages 97-104.

"Chapter 9298, Acts 1923 providing for a Supplemental Additional and alternative method of making local improvements in cities and municipal Corporations and for providing for Special assessments for the costs thereof, authorizes municipalities to make assessments against private property for local improvements *on the basis only of the special benefits flowing to the property assessed* on account of such local improvements." Atlantic Coast Line Railroad Co. vs. City of Lakeland 94 Fla. 347.

"In some jurisdictions, it is the rule that special or peculiar benefits actually accruing and determined after a notice and hearing is essential to the validity of a special assessment, while, in other jurisdictions, it is held that the presumption of special benefits grounded upon a legislative determination thereof is sufficient to justify an assessment in proportion to the front footage or according to any other fair and reasonable rule. Dillon on Municipal Corporations, 5th Edition, Volume 4, page 2615. *The statute under consideration is controlled by the former*

rule." 17th Hdnt. City of Ft. Myers vs. State of Florida, supra.

"Whether private property which is assessed or to be assessed for any part of the costs of a proposed or fully completed public improvement is in fact specially benefitted by the paving of a street on which the property assessed or to be assessed abutts or by any other local public improvement *is a question to be ascertained and established as any other fact may be established, that is to say,* by competent evidence of probative value *sufficient to establish the fact; it does not rest in the mere assertion of the municipal authorities.*" Atlantic Coast Line Railroad Co. vs. City of Lakeland Supra 2nd Hdnt.

"Under Chapter 12719 Acts of 1927" (or its prototype 9298 Acts 1923) "it is mandatory that before the resolution authorizing public improvements provided in subsection B" (or Section 3, 1923 Acts) "can be legally adopted the city commission must have determined that benefits will accrue to the property improved, the amount thereof, how such benefits will be prorated and that Special Assessments will be made in proportion to said benefits as directed by Subsection A" 7 Hdnt. (or Sec. 2, 1923 Acts, City of Fort Myers vs. State of Florida, et al, Supra).

"It is contended that the bill of complaint fails to allege the adoption and publication by the town's governing authority *of a resolution* determining that benefits *would accrue to the property,* the amount of the benefits, that the special assessment would be made proportionate to the benefits, and that they would not exceed the benefits."

"This contention is well founded for the bill of complaint does not contain any allegation relating to this prerequisite jurisdictional resolution."

"It is mandatory that a resolution in conformity with this statutory requirement be adopted, City of Ft. Myers v. State of Florida 95 Fla. 704, 117 So. 97."

"We think it imperative under the applicable statute that there must have been a specific finding of benefits that the assessments made were not in excess of the benefits found and that any assessment imposed without regard to the benefits found is arbitrary and invalid."

APPENDIX B

The bill alleges,

"That by authority of and pursuant to Chapter 9298, Laws of Florida, Acts of 1923 as compiled in Sections 3022 to 3042, both inclusive, compiled General Laws of Florida, 1927, plaintiff, through its governing authority during the years 1925, 1926 and 1927 provided for constructing, grading, paving and otherwise improving certain streets, avenues and highways in said Town, and for grading, laying and paving sidewalks therein, and provided for the payment of costs of such streets and sidewalk improvements, as hereinafter set forth." Paragraph second of the bill.

And in response thereto the answer alleges:

"Answering paragraph 2 of said bill of complaint, respondents say, that it is untrue, in that the acts and doings of plaintiff through its governing authority, alleged in said paragraph, were not by authority and pursuant to Chapter 9298, Laws of Florida, Acts of 1923, as compiled in sections 3022 to 3042, both in-

clusive, Compiled General Laws of Florida; that the plaintiff did not and has never acquired any authority under said statute to do the acts alleged to have been done; that the plaintiff, through its governing authority, failed utterly to comply with the conditions precedent or jurisdictional prerequisites prescribed by the statute before attempting to invoke the authority of said statute to do said acts; that the plaintiff, through its governing authority, gave no notice of a hearing to determine the amount of special benefits that would actually accrue to the property abutting on the streets by the improvements of such streets as alleged to have been provided for in said paragraph of the bill; that the plantiff, through its governing authority failed to hold any hearing to receive and consider any testimony from which it would determine the amount of such special benefits to be prorated among the various pieces of property, including that of respondents, abutting on such streets, and failed to receive and consider any such testimony, and failed to determine the amount of any such special benefits; that no special benefits were pro-rated among the various pieces of abutting property, by which the proportion of the special benefits that would accrue to the same, to the assessments to be made against the same, could be ascertained; but that the assessment was made in proportion to the costs of such improvements and in entire disregard of any special benefits which might accrue to the abutting property from the improvements. That by reason of the foregoing, the acts, alleged to have been done in said paragraph 2, were done without the authority of said act, chapter 9298, Laws of Florida, 1923, and are a nullity so far

as they affect the abutting property, including that of the defendants, to the extent of authorizing a valid assessment to be levied against the same for the purposes in the bill alleged." Second paragraph of Answer.

APPENDIX C

The order is affirmed.

WHITFIELD, BROWN, and BUFORD, JJ., concur.

CHAPMAN, J., concurs specially.

TERRELL, C. J., dissents.

BROWN, Justice (concurring).

I am inclined to the view that the court below was justified in denying the motion to dismiss in view of the holding of this Court in Sawyer v. Town of Mount Dora, 108 Fla. 456, 146 So. 563, 148 So. 209. See also Summerland, Inc., v. City of Punta Gorda, 101 Fla. 543, 134 So. 611. I do not think we are called upon to discuss what if any defenses the appellants may or can assert by way of answer to the bill, or the sufficiency thereof.

CHAPMAN, Justice (concurring specially).

I agree to the conclusion reached in the opinion prepared by Mr. Justice THOMAS in the case at bar. The bill of complaint seeks to enforce a lien for improvements in the form of pavement of streets and sidewalks against the abutting property of the appellant situated in the City of Monticello, Florida. It is contended here that the costs

of the special assessments are in excess of the increased value of the property by reason of the special benefits derived from the improvements.

The power to create such liens can or may have or possess the apparent authority to deprive an owner of his property without a hearing and the effect thereof is the taking of property without due process of law. If it can be shown in this case that the costs of special assessments exceed the increased value of the property by reason of the special benefits derived from the improvements, then the effect thereof is an arbitrary and unwarranted exercise of legislative power, or if it can be made to appear that there has been some action on the part of the legislative power in connection with the levy of the special assessments amounting to denial of the equal protection of the law, then the courts are open to protect the constitutional rights of the property owner. See Atlantic Coast Line R. Co. v. Gainesville, 83 Fla. 275, 91 So. 118, 29, A.I.R. 668; Atlantic Coast Line v. City of Lakeland, 94 Fla. 347, 115 So. 669; City of Fort Myers v. State, 95 Fla. 704, 117 So. 97; Town of Gulfport, etc. v. Mendels, 127 Fla. 730, 174 So. 8.

It is the settled law that special assessments can be sustained only upon the theory that property assessed receives some special benefit from the improvement differing from the benefit that the general public enjoys. If the foundation of the right to levy special assessments does not exist, this and other defenses supra can or may be interposed by an answer and evidence taken in support thereof. See vol. 5, McQuillin, Municipal Corporations (2nd Ed.) pages 645-6, par. 2193.

APPENDIX D

It is almost universally held that, if the assessment is wholly void, estoppel does not obtain. In Corpus Juris, where the authorities are collated and digested, we have:

"Subject to some limitations which have not met general acceptance, it has been very generally held that the doctrine of estoppel has no application in those cases, where the assessment is wholly void, as * * * * * * * * *where the improvement district has failed to secure the power to make a levy* * * * * * * * * *where the assessment was made in a manner* which renders it invalid, *where the assessment is void for failure to give an opportunity for a hearing on the question of benefits* * * * * * * * * *or because it was not made with a view to any benefits but solely according to location.*" 44 C. J. 687, Sec. 3160 (bb).

"While in some jurisdictions, important limitations are placed upon the rule, the great weight of authority is to the effect that, if the assessment *is for any reason wholly void,* a property owner who stands by and offers no objection to the making of an improvement which benefits his property, *will not,* under the general rule, be estopped from objecting to the assessment against his property; and, except in a few jurisdictions, this principle has been applied with great frequency where the assessment *was void for an entire lack of jurisdiction to make the improvements,* on the theory that the property owner is not more estopped from questioning the jurisdiction of the Council or from questioning the jurisdiction of the Council or its governing body upon the facts than he would be from questioning the jurisdiction of a judicial tribunal which should attempt to deprive him of his property." 44 C. J. 692, Sec. 3164 (bbb).

The Supreme Court of Florida, itself, holds that way:

Gulfview Apartments, Inc. et al vs. City of Venice, 108 Fla. 41, 145 So. 842, where it is said,

"When paving assessment is void, failure to object within time limited does not raise estoppel."

And in another place in the opinion:

"We are conscious of the rule to the effect that the doctrine of estoppel has no application when an assessment is wholly void; that is to say, when the assessment is made in such a manner as to render it invalid, or when *constitutional or statutory provisions essential to its validity are completely ignored.*" Gulfview Apartment vs. City of Venice, 108 Fla. 41, 145 So. 842.

Also in Combes vs. City of Coral Gables, 168 So. 524, 124 Fla. 374:

"Rule that taxpayer may waive his right or may be estopped to contest validity of tax lien is not applicable where lien is utterly void."

In the instant case, the holding that appellants are estopped is expressly based on the hypothesis that the assessment is not void, as witness the following quotation from the opinion in the instant case:

"Bearing in mind the premise that no defects in the procedure culminating in the lien rendered them void, we think the combined circumstances reflected in the record establish such acquiescence on the part of the appellee property owner that she may be said to have become estopped."

No. 194. FINLAYSON ET VIR. *v.* TOWN OF MONTICELLO. Appeal from the Supreme Court of Florida. October 9, 1944. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Campbell* v. *Olney*, 262 U. S. 352; *North Laramie Land Co.* v. *Hoffman*, 268 U. S. 276, 283; *Utley* v. *St. Petersburg*, 292 U. S. 106; *Anderson National Bank* v. *Luckett*, 321 U. S. 233, 247. *Mr. Weldon G. Starry* for appellants. *Mr. Lawrence A. Truett* for appellee. Reported below: 154 Fla. 274, 17 So. 2d 84.